No. 85-27(2)

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court

OF THE

## UNITED STATES

OCTOBER TERM, 1984

LOS ANGELES UNIFIED SCHOOL DISTRICT; BOARD OF EDUCATION OF THE CITY OF LOS ANGELES; and HARRY HANDLER, SUPERINTENDENT, In His Official Capacity,
*Petitioners and Cross-Respondents,*
vs.
LOS ANGELES NAACP, BEVERLY HILLS-HOLLYWOOD BRANCH NAACP, SAN PEDRO-WILMINGTON BRANCH NAACP, WATTS BRANCH NAACP, SAN FERNANDO VALLEY NAACP, and CARSON NAACP,
*Respondents and Cross-Petitioners.*

On Writ of Certiorari to the United States Court of Appeals, Ninth Judicial Circuit, No. CA-81-5772

## CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

G. WILLIAM SHEA,
*Counsel of Record,*
PETER W. JAMES,
MICHAEL M. JOHNSON,
JAY W. GENDRON,
600 Wilshire Boulevard,
Los Angeles, California 90017
(213) 624-2400,
JERRY F. HALVERSON,
Los Angeles City Board of Education,
450 North Grand Avenue, Room A-215,
Los Angeles, California 90012,
(213) 625-6601,
*Attorneys for Petitioners and Cross-Respondents.*

*Of Counsel*
MCCUTCHEN, BLACK, VERLEGER & SHEA

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

BEST AVAILABLE COPY

4 pp

## CROSS-RESPONDENTS' ("THE DISTRICT") RESPONSE TO THE CROSS-PETITION OF LOS ANGELES NAACP, ET AL. ("NAACP")

### I

### THE QUESTION PRESENTED IN THE CROSS-PETITION ASSERTS A RESERVATION OF FEDERAL RIGHTS IN THE STATE COURT CRAWFORD PROCEEDINGS. THIS ASSERTION IS CONTRARY TO THE RECORD BELOW.

The sole question presented by the NAACP cross-petition for certiorari is

> "Whether a federal court, in a federal school desegregation case under 42 U.S.C. § 1983, should apply claim preclusion to a state court judgment, which was limited by express reservation of federal law issues, and, in which a subsequent change in state law renewed the opportunity to litigate federal issues, but which closed without being so litigated?"

In *Crawford I*[1] and *Crawford II*,[2] both courts expressly recognized that the *Crawford* plaintiffs had litigated in those state proceedings the same federal de jure segregation claims asserted again in this case. (See the District's petition at pp. 6, 7-8, 12, 13.) Moreover, after holding that the trial court's findings did not establish de jure conduct, the Court in *Crawford II* remanded the case to the state trial court for further proceedings. 113 Cal.App.3d at 656. During those

---

[1] *Crawford v. Board of Education*, 17 Cal.3d 280 (1976)

[2] *Crawford v. Board of Education*, 113 Cal.App.3d 633 (1980)

further proceedings the *Crawford* plaintiffs sought to have the state trial court enjoin alleged de jure conduct by the District. 750 F.2d at 745. This Court should not consider a question presented that is based on a factual assertion which is contrary to both the record and the opinion below.

## II

## THE ISSUE OF MERGER SHOULD BE REJECTED BECAUSE THE MERGER ARGUMENT RESTS UPON THE SAME ERRONEOUS FACTUAL ASSERTION OF RESERVED RIGHTS. THIS ISSUE ALSO WAS NOT RAISED BELOW.

The cross-petition alleges that "(t)he entire analysis of merger and its applicability was ignored in the opinion below, because the opinion focuses solely and erroneously, on the bar effects of Crawford II." Cross-petition at p. 35. In so stating, the cross-petition raises an argument, based solely on California law, that was not presented to either the district court or the court of appeals. It is the general rule that a federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1975). Moreover, the Supreme Court does not ordinarily decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1975). The cross-petition cannot properly criticize the court of appeals for failing to discuss an argument which the NAACP did not raise. Nor should this Court grant a cross-petition for certiorari to consider that state-law argument for the first time.

The cross-petition asserts that the *Crawford* plaintiffs' federal rights merged into a res judicata judgment, which, however, did not include pre-1963 federal rights

because those rights were reserved. (Cross-petition at pp. 34-35.) It further asserts that the reserved federal rights and the merged federal rights were never raised after that 1969 judgment.

The alleged reservation of pre-1963 rights is based upon a trial stipulation before trial judge Gitelson in the *Crawford* case. (Appendix to cross-petition at pp. 35b-37b, 49b, 53b, 54b & 55b.) However, as that judge observed (*id.* at p. 46b), that stipulation reserved nothing — it was only a temporary trial guide on the order of proof. The stipulation was later vacated. (*Id.* at pp. 148b & 158b.) Moreover, as the District's petition for writ of certiorari demonstrates (Appendix at pp. 214a-215a) and as the court below held, the *Crawford* plaintiffs did litigate de jure issues as late as 1980 and 1981. 750 F.2d at 745. Thus the merger argument, raised here for the first time, rests on factual assertions that are flatly contradicted by the record.

## CONCLUSION

For these reasons, the Court should deny the cross-petition for writ of certiorari.

Respectfully submitted,

G. William Shea,

Peter W. James,

Michael M. Johnson,

Jay W. Gendron,

Jerry F. Halverson,

*Attorneys for Petitioners*

*and Cross-Respondents*